No. 76-254

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

VERIT INDUSTRIES and MARVIN COBB,

Petitioners,

vs.

JOE OHASHI

Respondent.

Answer to Petition for Writ of Certiorari

To the United States Court of Appeals

For the Ninth Circuit

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ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States,

The respondent, JOE OHASHI, answers the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and objects to the granting of such petition on the following grounds:

1. The Order of Judgment of the Court of Appeals of the Ninth Circuit, in the instant case

did not stretch the "in connection with" requirement of Birnbaum v. Newport Steel Corp., 139 F.2nd 461, 463 (2nd Cir. 1952), Cert.Denied. 343 U.S. 959 (1952) and of Blue Chip Stamps v. Manor Drug Store, 421 U.S. 723, 44 L.Ed. 539, 95 S. Ct. 1917, (1975) to an "unprecedented length" as stated in the petitioner's brief to this Court. The decission of the Court of Appeals for the Ninth Circuit in the instant case did not ignore the holding of the Blue Chip Stamps Case as enunciated by this Court.

2. The Order of Judgment of the Court of Appeals for the Ninth Circuit interpreted the statutory definition of a "sale" as such term is defined under the Securities Exchange Act of 1934 ((15 U.S.C. Sec. 78c(a)(14)) and as such correctly found that the fraudulent activities complained of by the respondent in his complaint were activities which occurred in connection with the sale or exchange of securities.

3. The petitioners have not set forth any new points not already considered by the Ninth Circuit Court of Appeals. There is no evidence in the decision of the Ninth Circuit in the instant

case of an expansion of the scope of the "in connection with" requirement of Rule 10b-5 as stated by this Court in the Blue Chip Stamps case.

For these reasons the respondent requests that the Petitioners' request for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

STATEMENT OF THE CASE

The respondent incorporates herein the Statement of the Case of the petitioner, P. 6-7 of the petitioners' petition.

REASONS FOR NOT GRANTING THE WRIT

I.

Certiorari Should Not Be Granted as there is no showing that the decision of the Ninth Circuit Court of Appeals in the instant case enlarged the scope of the "in connection with" requirement of Rule 10b-5 as stated by this Court in Blue Chip Stamps v. Manor Drug Store, supra Pg. 1.

The Ninth Circuit Court of Appeals in the

instant case found that the respondent's complaint stated a cause of action for fraud in connection with the original acquisition of Verit stock by the respondent. The Court reasoned that since California law implies a covenant of good faith and fair dealing in every contract, whereby a party will do nothing to injure the right of another to receive the benefit of the agreement, and each will do everything that the contract presupposes that he will do to bring the bargain to fruition, the respondent could not get the full value of his bargain until the restrictions on sale were removed from his stock by Verit. Thus, under the facts and circumstances of this case and as plead in the herein complaint, petitioners' implied covenant of good faith continued and the exchange contract remained executory, until the restrictions were removed with the cooperation of Verit. Since the contract was still executory at the time the alleged fraud occurred, the alleged fraud occurred in connection with the sale of securities within the meaning of Section 10b and Rule 10b-5 and the respondent's complaint pleads

enough facts to withstand a motion to dismiss.

The fraud upon which the respondent complains occurred after the exchange but during the executory period of the exchange.

The respondent's complaint pleads that the contract by which the respondent acquired his Verit stock ("the Exchange Agreement") was still executory when the fraudulent activities occurred and the fraudulent activities effected the unperformed part of the bargain and that therefore the fraud was in connection with the sale or exchange of securities.

The Ninth Circuit Court of Appeals in the instant case found that the Exchange Agreement was still executory, and that a sufficient contractual relationship existed. The existence of a contractual relationship between the parties is an essential element to elevate the respondent to the status of a statutory seller under the Securities Exchange Act of 1934. Mount Clemens Industries, Inc. v. Bell, 464 F.2nd 339 (9th Cir. 1972). The Ninth Circuit Court of Appeals concluded that the respondent was a statutory seller under the

Securities Exchange Act of 1934 (U.S.C. Section 78c(a)(14). In Section 3(a)(14) of the Securities Exchange Act of 1934 a "sale" is deemed to encompass "any contract to sell or otherwise dispose of." The Exchange Agreement between the petitioner and the respondent contemplates the eventual disposition of the respondent's shares of Verit by sale or otherwise. In fact, any disposition of the respondent's shares is dependent upon the approval of the petitioner. This "approval" requirement is set out as part of an existing contractual relationship found in the Exchange Agreement between the parties which elevates the respondent to the status of a statutory seller.

The Ninth Circuit Court of Appeals then turned to the law of California, where the contract was made, to decide whether the contract was executory and then to federal law (Blue Chip Stamps v. Manor Drugs, supra Pg. 1) to ascertain whether the alleged fraud was <u>in connection with</u> the exchange of securities.

The Ninth Circuit Court of Appeals correctly found that every contract under California law

contains an implied covenant of good faith and fair dealing whereby no party will do anything to injure the right of any other to receive the benefits of the agreement, and each will do everything that the contract presupposes that he will do to bring the bargain to fruition. The Exchange Agreement presupposed that the respondent could not receive the benefit of his bargain until the transfer restrictions were lifted by Verit. The cooperation of Verit was necessary to permit removal of the restrictions. Under these circumstances the Ninth Circuit Court of Appeals held that Verit's implied covenant of good faith continued throughout the period of the Exchange Agreement and the Exchange Agreement remained executory until the restrictions were removed with the cooperation of Verit.

The Ninth Circuit Court of Appeals found that the Complaint alleged fraudulent activities of Verit and Verit's named officers and directors <u>in connection with</u> the still executory covenant of good faith and fair dealing of the Exchange Agreement. The aveerments in the complaint

together with the asserted detriment to Ohashi the Ninth Circuit stated was enough to withstand Verit and it's directors and officers Motion to Dismiss under Section 10b and Rule 10b-5 of the Securities Exchange Act of 1934.

II.

The Ninth Circuit Court of Appeals in the instant case did not stretch the "in connection with" requirement of the Blue Chip Stamps case to an unprecedented length as stated by the petitioners. It's decision follows the previous holdings of this court and does nothing to expand upon the law as stated by this Court in the Blue Chip Stamps case. In fact the author of the Ninth Circuit Court of Appeals decision in the underlying case is the same Judge Hufstedler whose dissenting opinion in Blue Chip Stamps v. Manor Drug Stores, 492 F.2d 136 (9th Cir. 1973) enunciated the same holding of this Court in Blue Chip Stamps, supra Pg. 1.

The decision of Judge Hufstedler in the underlying Ninth Circuit Court of Appeals decision in no way, shape or form errodes the "in connection

with" requirement as enunciated by this Court in the Blue Chip Stamps case. The decision of Judge Hufstedler of the Ninth Circuit Court of Appeals does not open the door to vexatious litigation as urged by petitioner but merely interprets the facts of the underlining Complaint with the existing case law as previously enunciated by this Court and the definition of "sale" in Section 3(a)(14) of the Securities Exchange Act of 1934.

CONCLUSION

For these reasons a Writ of Certiorari should not be granted to review the judgment of the Court of Appeals for the Ninth Circuit in the instant case.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

VERIT INDUSTRIES and MARVIN COBB, Petitioners, vs. JOE OHASHI	)	Case No. 76-254 AFFIDAVIT OF MAILING

I, JANIS CROUCH, say:

I am a citizen of the United States and a resident of the County of Los Angeles; I am over the age of eighteen years and not a party to the above-entitled action; my business address is 1901 Avenue of the Stars, Suite 1630, Los Angeles, California.

On November 10, 1976, I served a copy of the ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT filed in the within action on the interested parties to said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

SUPREME COURT OF THE UNITED STATES
Washington, D.C.

EDWARD L. CLABAUGH
1901 Avenue of the Stars
Los Angeles, CA 90067

LEDERER & LEVY
433 N. Camden Drive, Ste. 600
Beverly Hills, CA 90210

FIERSTEIN & STURMAN
1888 Century Park East
Los Angeles, CA 90067

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 10, 1976, at Los Angeles, California.

JANIS CROUCH